

Men Like Them

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Is it possible to compare what is currently happening to the US Supreme Court with the fate of the Polish Constitutional Court? I would say: it is. In at least four respects.

1) Brett Kavanaugh is not a criminal. He is not a thug, not a fraud and not a thief, possibly not even a liar (at least not intentionally). He is a man of honour, who knows and always knew what becomes a man like him, as a drunken, sexually intrusive, beer and testosterone fuming frat boy at college as well as as a perfectly decent judge at the federal court. In this respect, one can assume that his outrage at the fact that he is now being attacked in this way is truly heartfelt. From his point of view, these attacks don't reveal anything about him ("I went to Yale!"), but all the more about the attackers, who, by attacking a man like him, are on the opposite side of what's proper. And if he did misbehave, then that is explainable by the attack and excusable by the outrage caused by it: innocently suspected, the poor man, who wouldn't lose one's temper before the Senate in a situation like that, isn't that perfectly normal? This outraged, aggressive defence of one's own normality and righteousness in all situations in life, this equation: "men like me = normal = righteous = entitled to power" as a binding precondition of any political debate about him and the power to be handed over to him is very familiar to me from my contacts with politicians and jurists close to the PiS.

2) Brett Kavanaugh sells himself as a conservative. But what is expected of him is nothing less than conservative, quite in the same way as PiS and Fidesz are the opposite of conservative in terms of keeping the existing allocation of goods and power safe from political contestation. Kavanaugh's mission is exactly that: to overthrow the existing allocation of goods and power. He is to re-politicize and re-contest the rights of women and minorities, which protect them from disciplinary power and discrimination. He is to re-install the claim to normality and power of men like him, also and especially against the existing. It's true that previous Republican nominees like Anthony Kennedy, David Souter or Sandra Day O'Connor had freed themselves from that mission after they had taken office. But that was back in the last century. Today is Trump. When it came down to it, Kavanaugh decided to stop showing the Senate his well-coiffed conservative lawyer's face and instead put on a beet-red, teary alt-right grimace, ranting against leftist conspiracy and Clinton revenge – and he was successful with it. That's how they want him. That's what becomes a man like him nowadays. [2400 law professors publicly protest?](#) The man, they say, is doing something right.

3) Brett Kavanaugh will be at the US Supreme Court what Mariusz Muszyński and the other "anti-judges" are at the Polish Constitutional Court: permanently branded by the circumstances under which they came into office. Muszyński et.al. sit in posts that have already been filled by others, and their illegitimacy as judges directly affects the functioning of the Constitutional Court whose judgments, as far as the "anti judges" have contributed to it, are not recognized by some Polish

courts. Arguably, this will not be the case with Kavanaugh. But his brand, unlike that of Muszyński et.al., is of a personal nature. Above him hovers the suspicion of having gotten away with rape and lying to the Senate in his confirmation process (the latter isn't even exactly a suspicion any more). As in Poland, every judgment that depends on his vote is tainted with the stigma that the losing party will be entitled to the thought that, if only the court would have been legitimately staffed, she might have won.

4) The damage is borne by the independent judiciary as a whole. As in Poland, that sort of damage is not equally alarming news for everyone, though. Those who aim to assert the normality and claims to power of men like them, as opposed to the equal rights of free people, have usually little use for an independent judiciary anyway – unless it's about the rights of men like them (or actually positions of power such as the "right" to shoot other people). It's always about power anyway, even in law. Everything is politics, including and particularly the law. It is always only about us versus them, never about me and you as equal bearers of rights. A court, from that point of view, is just another club to bludgeon your opponents with, and a shield to keep your opponent's blows away, and who gets to wield those instruments is, in its turn, a matter of power. In Poland this seems to be very much the present already. In the US, it might quite possibly be the future.

Excuse me, Mr. Prantl?

A brief comment on another rather strange event this week: One of Germany's most prominent journalists, Heribert Prantl of *Süddeutsche Zeitung*, wrote an [editorial](#) on the occasion of German Unity Day attacking the Basic Law in a most stunning manner. This is the same Heribert Prantl, I must add, who built his career largely on the defence of this very Basic Law's fundamental rights against the law-and-order amendments of the 1990s. The constitutional part that caused Prantl's ire this time was the preamble: "At the top of this so praiseworthy constitution", he writes, "is a swindle, a boundlessly complacent, almost lying sentence." Oh, never mind *almost*: it is a lie, a "misnomer, a written lie"!

What is? The sentence included in the preamble in 1990 claiming the Germans in the federal states had "completed the unity and freedom of Germany in free self-determination". Prantl finds this scandalous because: no unity! In East and West, Germans keep being different. Differently wealthy, differently happy, differently content with the constitutional order. Unity completed? *Lügenconstitution*!

Now, I agree with Prantl that there would have been good reasons to have let the citizens of the GDR have their say about the constitutional order which from 1990 also became theirs. That would have been fair and wise, even if I am not altogether certain whether we would always have been so happy with all the direct-democratic achievements Prantl and many others had favoured back in the day and keep calling for to date.

But to attach this failure to the Basic Law itself, using the "unity completed" phrase in the preamble as a hook, is a whole different matter. "Unity completed", that means

first of all that Germany has found its final territorial form in 1990. Since 3 October 1990, there is no such thing as territory in Europe that would actually be Germany if only it were allowed to. Not in Pomerania, not in Prussia, not in Silesia, not in Alsace. The reunification of 1990 was the last one, that matter is settled for good. We're at peace. Unity completed? It most emphatically is!

In addition, of course, one can project all sorts of substantive ideas of unity into the preamble, in the sense of integration and *Leitkultur* and so on. From there, it's only a few steps to the postulate of a homogeneous people. Is that what Prantl is aiming for? That would surprise me, but even if he did, it would remain unexplained why he calls another interpretation of the text a "lie" and thus attaches the free-floating resentment in East Germany to the constitution. Perhaps he can explain this in his next editorial? On 23 May next year, when the Basic Law celebrates its 70th birthday, would be a nice opportunity to do so.

A text of tremendous power

[NORA MARKARD](#) went to the Brandenburg Gate the day before this year's Day of **German** Unity to see the dress rehearsal of Marta Górnicka's attempt to put the text of the Basic Law on stage. "The text gains tremendous power when you pronounce it," she writes, "when you pronounce it as if you mean every word of it. Man's dignity is inviolable. To respect and protect it is the duty of all state authorities. (...) The following fundamental rights bind the legislative, executive and judicative branches as directly applicable law. The radicality of these words suddenly becomes tangible, palpable."

The far-right AfD has come up with a proposal for an amendment to the Basic Law in the **German Bundestag** to include freedom of religion among the fundamental rights that, if abused, can be "forfeited" according to Article 18 *Grundgesetz*, a move that on its surface fits nicely with the islamophobe profile of that party but in fact, as [KLAUS FERDINAND GÄRDITZ](#) explains, is a mere "political stunt", Art. 18 being a functionless "fear clause", which has never been put into practice for good reason and which could be safely removed from the constitution without loss (both German).

France's constitution is turning 60 these days, which gives [EUGÉNIE MÉRIAU](#) an opportunity to take a closer look at the current debate about the extreme concentration of power in the hands of the *Président de la République* and the need for constitutional reform.

On the subject of Kavanaugh: [PAULINE WELLER](#) takes a comparative look at the systems of appointing constitutional judges in Germany and the **USA** and comes to the conclusion that the German system does not come off so badly in this comparison.

In **Switzerland**, a constitutional event of potentially enormous consequence is approaching: the so-called "self-determination initiative" in November, where the Swiss people are to vote on whether international law, including the European

Convention on Human Rights, should still be binding to the domestic legislator. [BENEDICT VISCHER](#) reports (German).

In **South Africa**, the Constitutional Court recently declared the ban of private Cannabis use unconstitutional. [JAMES FOWKES](#) analyses what the ruling reveals about the institutional self-image of this influential court and its transformation.

In **Hungary**, the executive and legislative branches are increasingly ignoring the instructions of the courts to comply with their obligations under the Freedom of Information Act, as [DÁNIEL G. SZABÓ](#) reports from his own experience.

In **Germany**, the traditional annual conference of jurists (*Juristentag*) discussed the reform of asylum law and recommended to the legislator to entrust the Federal Administrative Court with the task of making guiding decisions on the actual persecution situation in individual states. [BJÖRNSTJERN BAADE](#) advises to additionally make the Federal Foreign Office's situation assessments more transparent.

In its *Ahmed* ruling, the European Court of Justice clarified that **EU** refugee law does not grant civil war refugees any less protection than refugees under the Geneva Convention. [NULA FREI](#) analyses the decision (both German).

Elsewhere

For [RALF MICHAELS](#), the Kavanaugh case gives **US** jurists, particularly left-leaning ones, reason to revisit their understanding of law and politics. [ILYA SOMIN](#) explains why the confirmation of a judge is not like a criminal trial, in which presumption of innocence has its place, but rather like a job interview, in which it hasn't.

[CATHÉRINE VAN DE GRAAF](#) analyses a judgment of the Human Rights Court in Strasbourg on ill-treatment in the workplace.

[MIHNEA STOICA](#) believes that the referendum in **Romania** on the constitutional ban of same-sex marriage will likely be successful but still rather benefit than harm the LGBTIQ community in the long run.

[ANURAG DEB](#) places last September in a historical context as a month that "may go down in **Indian** law as one of the most liberal months in the history of the country's Supreme Court". [GAUTAM BHATIA](#) looks back on the term of office of the outgoing Chief Justice Dipak Misra and believes that this era was the high-water mark of the Court's expansive "substantive justice" jurisdiction .

[OLIVIER BEAUD](#) is disappointed by the new website of the **French** Constitutional Council.

[ALEKS SZCZERBIAK](#) explains why the upcoming regional elections in **Poland** are so important.

[ARGELIA QUERALT](#) reports on the Strasbourg Human Rights Court's decision not to intervene in the dispute over the **Catalan** "independence referendum" a year ago.

[ELENA CHACHKO](#) examines the International Court of Justice's interim measures against the **US** in the fight about Iran sanctions.

That's it for this week. All the best, and take care,

Max Steinbeis

A previous version contained an error regarding the name of Benedict Vischer which has been corrected.

